FILE COPY

FILED
DEC 19 194
CHARLES ELMORE CR

# Supreme Court of the United States

## Nos. 329, 330.

MORRIS KLEIN AND HARRY BURKE,
PETITIONERS,

VS.

UNITED STATES OF AMERICA.

**PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.**

WALTER A. RAYMOND,
1200 Dierks Building,
Kansas City 6, Missouri,
*Counsel for Petitioners.*

IRA B. MCLAUGHLIN,
LOUIS WAGNER,
JOSEPH KORALCHIK,
All of Kansas City, Missouri,
WILL H. HARGUS,
Harrisonville, Missouri,
*Of Counsel.*

## INDEX


Opinions Below ..... 2
Jurisdiction ..... 2
Questions Presented ..... 2
Constitutional Provisions and Statutes Involved ..... 3
Reasons for Granting the Petition for Rehearing ..... 3
Argument ..... 6
Conclusion ..... 18


### Cases Cited


Akins vs. State of Texas, 325 U. S. 398, 65 S. Ct. 1276, Footnote 1 ..... 5, 11
Brooks vs. U. S., 164 F. 2d 142 ..... 16-17
Cartello vs. United States, (8 Cir.) 93 F. 2d 412 ..... 14
Colbaugh vs. U. S., 15 F. 2d 929 (8 C. C. A.) ..... 5, 16
Cox vs. U. S., 96 F. 2d 41 ..... 5, 15, 16
Crain vs. U. S., 148 F. 2d 615 ..... 5, 14
Dahly vs. United States, (8 Cir.) 50 F. 2d 37 ..... 12
Dennert vs. U. S., (6 Cir.) 147 F. 2d 286 ..... 5, 15
Dickerson vs. U. S., 18 F. 2d 887 (8 C. C. A.) ..... 5, 15
Direct Sales Co. vs. U. S., 319 U. S. 703, 63 S. Ct. 1265 ..... 5, 13
E. I. Du Pont de Nemours & Co. vs. Frechette, (8 Cir.) 161 F. 2d 318 ..... 4, 11
Gerson vs. U. S., 25 F. 2d 49 (8 C. C. A.) ..... 5, 15
Guy vs. Utecht, (8 Cir.) 144 F. 2d 913 ..... 4, 11
Jianole vs. U. S., 299 Fed. 496 (8 C. C. A.) ..... 16
Kassin vs. U. S., (5 Cir.) 87 F. 2d 183 ..... 5, 15
Lamber vs. U. S., 26 F. 2d 773 ..... 5, 16
Leslie vs. U. S., 43 F. 2d 288 (10 C. C. A.) ..... 5, 16
Little vs. United States, (8 Cir.) 93 F. 2d 401, Certiorari denied 58 S. Ct. 643, 303 U. S. 644, 82 L. Ed. 1105 ..... 5, 11
Lucadam vs. U. S., 280 Fed. 653 ..... 16

McDaniel vs. U. S., 24 F. 2d 303 ..... 5, 16
Moss vs. U. S., 132 F. 2d 875 ..... 16
Nations vs. U. S., 52 F. 2d 97 (8 Cir.) ..... 4, 7
Roukous vs. U. S., 195 Fed. 353 (1 C. C. A.) ..... 5, 16
State vs. Nolan, 168 Mo. 446, 68 S. W. 346 ..... 5, 11
State vs. O'Brien, 168 Mo. 404, 68 S. W. 341 ..... 5, 11
Steedle vs. United States, (3 Cir.) 85 F. 2d 867 ..... 4, 9
Thomas vs. U. S., 57 F. 2d 1039, 1042 (10 Cir.) ..... 4, 7, 16
Turinetti vs. U. S., 2 F. 2d 15 (8 C. C. A.) ..... 5, 15
U. S. vs. Dire, (2 Cir.) 159 F. 2d 818 ..... 5, 13
U. S. vs. Potash, 118 F. 2d 54 ..... 16
United States vs. Kantor, (2 Cir.) 78 F. 2d 710 ..... 4, 9
United States vs. Saylor, 322 U. S. 385, 64 S. Ct. 1101 ..... 4, 9
U. S. vs. Silva, (2 Cir.) 131 F. 2d 247 ..... 5
U. S. vs. Sprengel, 103 F. 2d 876 ..... 4, 7
Walker vs. United States, (8 Cir.) 93 F. 2d 383, Certiorari denied 58 S. Ct. 642, 303 U. S. 644, 82 L. Ed. 1103 ..... 5, 12

STATUTES AND TEXTBOOKS CITED

Constitution of the United States, Article I, Section 1 ..... 3, 4, 8
Constitution of the United States, Amendment XVII ..... 3, 4, 8
Missouri Constitution, 1945, Article VIII, Section 2 ..... 3, 4, 8
Rule 37 (b), Federal Rules of Criminal Procedure ..... 2
Rule 33, Rules of Supreme Court of United States as amended October 13, 1947 ..... 2
Sec. 11563, Rev. Stat., 1939 ..... 3, 4, 8-9
28 U. S. C. A., Sec. 1254 (1) ..... 2
Webster's New International Dictionary, Second Edition ..... 5, 11

# Supreme Court of the United States

## Nos. 329, 330.

MORRIS KLEIN AND HARRY BURKE,
PETITIONERS,

VS.

UNITED STATES OF AMERICA.

**PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.**

TO THE UNITED STATES SUPREME COURT, AND THE HONORABLE JUDGES THEREOF:

Morris Klein and Harry Burke, Petitioners, pray a rehearing on their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in the cases of Morris Klein, Appellant, vs. United States of America, Appellee, No. 13656, and Harry Burke, Appellant, vs. United States of America, Appellee, No. 13657 (which cases were consolidated and heard as one appeal) entered on July 21, 1949, affirming the judgments of the United States District Court for the Western District of Missouri.

## OPINIONS BELOW.

The Trial Court filed a memorandum and order on August 9, 1947, overruling defendants' motion to dismiss and overruling in part defendants' motion for bill of particulars. This memorandum and order appears on pages 13 to 23 of the record. No other opinion was filed by the trial court. The opinion of the Court of Appeals is reported in 176 F. 2d 184.

## JURISDICTION.

On the 7th day of November, 1949, an order was entered by this Court denying petitioners' petition for writ of certiorari, and by a timely application to this Court, an order was granted extending the time to file this petition for rehearing to and including December 21, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. A., Sec. 1254 (1). See also, Rule 37 (b) of the Federal Rules of Criminal Procedure promulgated by this Court February 8, 1946, and Rule 33 of the Rules of the Supreme Court of the United States as amended October 13th, 1947.

## QUESTIONS PRESENTED.

1. Whether the trial court erred in admitting evidence over appellants' objection on matters not connected with the appellants or connected with any transaction allegedly within the purview of the indictment.

2. Whether the trial court erred in refusing defendants' requested charge No. 3 (R. 617) in charging that the defendants could be convicted of conspiracy, although there was no evidentiary basis for said charge.

3. Whether the trial court erred in denying the motions of both Klein and Burke for judgments of acquittal

for the reason that there was no substantial evidence that either defendant was a party to the conspiracy charged in the indictment.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States, Article I, Section 1.

Constitution of the United States, Amendment XVII.

Missouri Constitution, 1945, Article VIII, Section 2.

Sec. 11563, Rev. Stat., 1939.

## REASONS FOR GRANTING THE PETITION FOR REHEARING.

(1) The trial court erred in admitting in evidence over the objections of the appellants, matters not connected with the appellants or connected with any transaction allegedly within the purview of the indictment.

The court erred in admitting evidence, over appellants' objection, to the effect that

(1) Lucius Carter and three other men (R. 442) rode to some point on Brooklyn Avenue, in a car driven by Bob McKissick (R. 442); there they were caused to and did, by impersonating other persons (R. 446) cast illegal votes (R. 444); that then they were driven to a Justice of the Peace office on Fifteenth Street, where they waited for a time (R. 444).

(2) Lucius Carter, Jesse Bell, Elnora Hodges (Bell) and Marjorie Jackson (R. 445) went to a point on Troost, between 11th and 12th, in a car driven by a man named Charlie (R. 445); there they were caused

to and did cast illegal votes by impersonating other persons (R. 446).

(3) Marjorie Jackson was paid for twice voting illegally (R. 464), once by the driver of the car she rode in and once by a man on Fifteenth Street (R. 464).

These alleged transactions were *res inter alios acta* as to each appellant; they were in no way connected with the appellants or any transaction allegedly within the purview of the indictment.

*Thomas* v. *U. S.*, 57 F. 2d 1039, 1042 (10 Cir.).
*U. S.* v. *Sprengel*, 103 F. 2d 876.
*Nations* v. *U. S.*, 52 F. 2d 97 (8 Cir.).

(2) The court erred in refusing defendants' requested charge numbered 3 (R. 617) and in charging the jury that the defendants could be convicted of conspiracy to prevent some of the legally qualified voters from receiving a ballot and voting for United States Senators or Representatives in Congress (R. 598) for the reason that there was no evidentiary basis for said charge.

Constitution of the United States, Article I, Section 1.
Constitution of the United States, Amendment XVII.
Missouri Constitution, 1945, Article VIII, Section 2.
Sec. 11563, R. S. Mo., 1939.
*United States* v. *Kantor*, (2 Cir.) 78 F. 2d 710.
*Steedle* v. *United States*, (3 Cir.) 85 F. 2d 867.
*United States* v. *Saylor*, 322 U. S. 385, 64 S. Ct. 1101.
*Guy* v. *Utecht*, (8 Cir.) 144 F. 2d 913.
*E. I. Du Pont de Nemours & Co.* v. *Frechette*, (8 Cir.) 161 F. 2d 318.

*Akins* v. *State of Texas,* 325 U. S. 398, 65 S. Ct. 1276, Footnote 1.

*State* v. *O'Brien,* 168 Mo. 404, 68 S. W. 341.

*State* v. *Nolan,* 168 Mo. 446, 68 S. W. 346.

Webster's New International Dictionary, Second Edition.

*Little* v. *United States,* (8 Cir.) 93 F. 2d 401, Certiorari denied 58 S. Ct. 643, 303 U. S. 644, 82 L. Ed. 1105.

*Walker* v. *United States,* (8 Cir.) 93 F. 2d 383, Certiorari denied 58 S. Ct. 642, 303 U. S. 644, 82 L. Ed. 1103.

(3) The court erred in denying the motions of both Klein and Burke for judgments of acquittal for the reason that there is no substantial evidence that either defendant was a party to the conspiracy charged in the indictment.

*U. S.* v. *Dire,* (2 Cir.) 159 F. 2d 818.

*Direct Sales Co.* v. *U. S.,* 319 U. S. 703, 63 S. Ct. 1265.

*Crain* v. *U. S.,* 148 F. 2d 615.

*U. S.* v. *Silva,* (2 Cir.) 131 F. 2d 247.

*Kassin* v. *U. S.,* (5 Cir.) 87 F. 2d 183.

*Dennert* v. *U. S.,* (6 Cir.) 147 F. 2d 286.

*Dickerson* v. *U. S.,* 18 F. 2d 887 (8 C. C. A.).

*Gerson* v. *U. S.,* 25 F. 2d 49 (8 C. C. A.).

*Cox* v. *U. S.,* 96 F. 2d 41.

*Turinetti* v. *U. S.,* 2 F. 2d 15 (8 C. C. A.).

*Roukous* v. *U. S.,* 195 Fed. 353 (1 C. C. A.).

*Leslie* v. *U. S.,* 43 F. 2d 288 (10 C. C. A.).

*McDaniel* v. *U. S.,* 24 F. 2d 303.

*Lamber* v. *U. S.,* 26 F. 2d 773.

*Colbaugh* v. *U. S.,* 15 F. 2d 929 (8 C. C. A.).

## ARGUMENT.

The court erred in admitting evidence of illegal voting and money paid therefor that were wholly without the purview of the indictment and wholly disconected with the appellants or the alleged conspiracy, *i. e.*, of illegal voting by Lucius Carter and three other men on Brooklyn, of illegal voting by Marjorie Jackson and three other persons on Troost Avenue and of Marjorie Jackson being paid for illegally voting twice.

Each and all of the three instances of evidence mentioned in Point V of our points to be argued were wholly without purview of the indictment, not connected in any way with these appellants or any defendant in this cause; not even remotely connected with any person named in the evidence as working with or for either appellant. The court recognized the necessity of making some evidentiary connection between the perpetrators of these illegal acts and the defendants (R. 442, 444, 445); the court stated "The Court will see that the defendants' rights are preserved in that respect" (R. 445) and even manifested slight impatience at repeated objections (R. 450). Yet, this highly inflammable and prejudicial evidence went to the jury and, when the "misunderstanding" of the jury is considered (R. 626) could have and we believe did, tip the scales of justice against these appellants.

A great number of wholly disconnected persons, organizations and interests were active in this hotly contested primary (R. 140, 141). Appellants are entitled to be tried only upon evidence tending to prove that they transgressed; they should not be convicted, in whole or

part, upon evidence of transgressions by others, with which they were wholly disconnected.

*U. S.* v. *Sprengel,* 103 F. 2d 876 (3 Cir.).
*Nations* v. *U. S.,* 52 F. 2d 97 (8 Cir.).

The persons allegedly in the car driven by Bob McKissick were, under the evidence, never even in the 10th precinct of the 1st ward. None of the persons in the car driven by "Charlie" voted in said precinct, and were not even asked to vote therein. There is no evidence that this car was even caused to come to the polls in this precinct at the request of or by arrangement with either appellant. The feeble pretense of an attempted connection was the alleged statement by Klein to the driver, Charlie, *i. e.,* "We don't need any voters now. If I need any, I will let you know later" (R. 451).

The most that can be said of this evidence is that it tended to prove that Klein may have suspected that there was a conspiracy to cause illegal votes to be cast in some other part of the city and declined to become a party thereto. There was not even an abortive attempt to connect appellants with the Brooklyn Avenue incident.

The attempted connection here is not as strong as that attempted, but ruled insufficient, in the case of *Thomas* v. *U. S.,* (10 Cir.) 57 F. 2d 1039, 1042, where the court said:

> "(5) Mere knowledge or approval of or acquiescence in the object and purpose of a conspiracy without agreement to cooperate to accomplish such object or purpose is not enough to constitute one a party to the conspiracy. *Lucadamo* v. *United States,* (C. C. A. 2) 280 Fed. 653, 657; *Marrash* v. *United States,* (C. C. A. 2) 168 Fed. 225; *Turcott* v. *United States,* (C. C. A. 7); 21 F. 2d 829; *United States* v. *Lancaster,* (C. C. Ga.) 44 Fed. 896, 10 L. R. A. 333.

> The most that can be said is that Simons knew of and acquiesced in the conspiracy and was willing to enter it provided the organization was extended to Oklahoma. This was insufficient to connect him with the conspiracy charged."

The trial court erred to the great prejudice of the defendants in charging the jury they could find the defendants guilty of having prevented or caused to be prevented some of the legally qualified voters in said precinct and ward from freely receiving a ballot and voting for United States Senators or Representatives in Congress (R. 598, 610, 611) when there was no competent and substantial evidence that any qualified voter was prevented or caused to be prevented from voting for a United States Senator or Representative in Congress.

Article I, Section 1, of the Constitution of the United States provides that the electors for members of the House of Representatives of the United States Congress "shall have the qualifications requisite for elector of the most numerous Branch of the State Legislature."

Amendment XVII of the Constitution of the United States makes the same requirement as to electors for United States Senator.

Article VIII, Section 2 of the Missouri Constitution, 1945, so far as material here provides:

> "Section 2. All citizens of the United States, * * * over the age of twenty-one who have resided in this state one year, and in the county, city or town sixty days next preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people; * * *."

Sec. 11563, R. S. Mo., 1939, so far as material here provides:

> "No person shall be entitled to vote at any primary unless a qualified elector of the precinct and duly registered therein, * * * and known to affiliate with the political party named at the head of the ticket he calls for, and attempts to vote, or obligates himself to support the nominees of said party at the following general election."

The only persons who claimed they were prevented from voting were Estella Carter and George J. Gregerson. The testimony of neither Estella Carter (R. 348-360) nor George J. Gregerson (R. 273-278) shows she or he was legally qualified and entitled to vote at this primary as it fails to show either of them possessed the following required qualifications:

> (1) That either of them was over 21 years of age and a qualified elector;
>
> (2) That either of them was "known to affiliate with" either the Democratic or Republican party.
>
> The issue of their being presented was not submissible for the further reason that there was no evidence that either of them intended to vote for any candidate seeking his party's nomination for United States Senator or Representative in Congress.

As to George J. Gregerson there was no testimony he had lived in the State one year or in the city sixty days next preceding the date of this primary election.

A necessary element in the proof, which is here lacking, is that the voter who was "prevented" from voting must have had an intention or purpose to cast a vote for a candidate for United States Senator or Representative in Congress. See: *United States* v. *Kantor*, (2 Cir.) 78 F. 2d 710; *Steedle* v. *United States*, (3 Cir.) 85 F. 2d 867; *United States* v. *Saylor*, 322 U. S. 385, 64 S. Ct. 1101.

Gregerson was denied the right to vote not by Klein but by one of the election officials (R. 274, 276). Gregerson is not shown to have come in contact with Klein at any time that day.

The testimony of Estella Carter that she stood near the door of the voting place arguing for about a half hour with Klein between 6:30 and 7:00 that evening was corroborated by no one but was contradicted by Government witnesses: Foster McMullen (R. 233), Raymond Edward Haven (R. 241), Buccero (R. 509) and Morris Levine (R. 439, 440) and by defense witnesses, Rice (R. 354, 543), Presta (R. 539) and Mr. and Mrs. Ratcliff (R. 547, 548, 549, 550).

Estella Carter's failure to recall voters walking in or out of the polling place during the last half hour is astounding. The trial court found: "The evidence is that there were at least 12 votes cast between 6:30 and 7:00 o'clock in the precinct" (R. 521).

Government's Exhibit No. 7, Exhibit Book III, page 50, shows the only vote cast in the name of Estella Carter was recorded on line 285.

This Government exhibit shows her name had not been voted at 6:30 when she says Klein told her "I voted you." Her said uncorroborated statement is positively refuted by the voting records which the Government introduced and vouched for. As her name had not been voted at the time she claims this conversation took place and could not have been voted until twenty minutes or so later it is incredible that Klein would have started and maintained for half an hour an argument with her such as she relates but as to which she is uncorroborated.

The mere fact Estella Carter and George J. Gregerson were registered voters does not make a *prima facie* case as to their right to vote.

They were registered to vote in Missouri and under Missouri law. The effect of the Missouri election laws is controlled by the statutes and court decisions of Missouri. *Guy* v. *Utecht*, (8 Cir.) 144 F. 2d 913; *E. I. Du Pont de Nemours & Co.* v. *Frechette*, (8 Cir.) 161 F. 2d 318; *Akins* v. *State of Texas*, 325 U. S. 398, 6[illegible] Ct. 1276, footnote 1.

Under the law of Missouri the mere fact one is a registered voter is insufficient to carry to the jury the issue in a criminal case as to his being a qualified voter.

See the cases of *State* v. *O'Brien*, 168 Mo. 404, 68 S. W. 341, and *State* v. *Nolan*, 168 Mo. 446, 68 S. W. 346.

Webster's New International Dictionary, Second Edition, defines "prevent" as follows:

> "To forestall; to frustrate; to deprive of hope of power of acting, operating, proceeding, etc.; to ward off; circumvent."

That same work lists as synonyms: "Prevent, preclude, avert."

We therefore submit that, in any event, the evidence here is insufficient to prove Klein prevented or caused to be prevented Estella Carter from voting.

There was therefore no evidence authorizing a submission of the charge that defendants prevented qualified voters from voting for United States Senator or Congressman. The charge authorized a conviction on that issue and it is impossible now to determine that the jury did not convict on that charge. Therefore, we submit, it was prejudicial and reversible error to submit that issue and likewise prejudicial and reversible error to charge the jury that they could convict defendants on that issue.

Please see and consider in this connection *Little* v. *United States*, (8 Cir.) 93 F. 2d 401, Certiorari denied 58

S. Ct. 643, 303 U. S. 644, 82 L. Ed. 1105, and *Walker* v. *United States,* (8 Cir.) 93 F. 2d 383, Certiorari denied 58 S. Ct. 642, 303 U. S. 644, 82 L. Ed. 1103, holding to constitute a federal offense there must be interference in the election of federal officers and interference in the election of state officers is insufficient to constitute the offense.

In the case of *Dahly* v. *United States,* (8 Cir.) 50 F. 2d 37, a criminal conspiracy case, the court said (l. c. 44):

> "Our conclusion is that the evidence by which it is sought to connect Beaton with the conspiracy charged, even if a conspiracy existed, cannot be considered as substantial; at most, it amounts to a very slender suspicion.
>
> The evidence as to the case against Dahly—whether the conspiracy charged existed and whether he was a party thereto—is also entirely circumstantial."

In holding no submissible case was made, the court said (l. c. 44):

> "Without trenching upon the general rule that appellate courts will not usually weigh the evidence, yet on account of the foregoing considerations, and in view of the exceptional facts in the case, we are of the opinion that the testimony of Smith relative to the particular matters mentioned cannot be held to be substantial in any true sense of that word. 17 C. J., Secs. 3594-3596; *Sykes* v. *United States,* 204 Fed. 909 (C. C. A. 8); *United States* v. *Murphy,* (D. C.) 253 Fed. 404; *Jahnke* v. *State,* 68 Neb. 154, 94 N. W. 158; 104 N. W. 154; *Green* v. *State,* 6 Okla. Cr. 585, 120 Pac. 667; *Standford* v. *State,* 16 Okla. Cr. 107, 180 Pac. 712; see, also *Mickle* v. *United States,* 157 Fed. 229 (C. C. A. 8); *State* v. *Moe,* 68 Mont. 552, 219 Pac. 830; *State* v. *Wilson,* 76 Mont. 384, 247 Pac. 158; *Cooper* v. *State,* 130 Miss. 288, 94 So. 161.

> But even giving full credence to his testimony, yet the suspicious circumstances thus raised fall far short of being substantial evidence of the conspiracy charged and of Dahly's connection therewith."

Likewise, in this case we submit the testimony of Estella Carter is unbelievable and not substantial evidence; that in any event, it does not rise to any dignity above suspicion and conjecture and is insufficient to authorize the charge as made.

Regardless of all this, the fact that there is no evidence that either Estella Carter or George Gregerson intended to cast a vote for a Congressional or Senatorial candidate is fatal. The refusal of defendants' requested charge numbered 3 was prejudicially erroneous.

As to Burke, there was no evidence that he was working for any particular candidate or slate of candidates on the Democratic ticket. As to Klein, the undisputed evidence was that he did not tell his workers what candidates he was supporting; that he told them only to get out the vote (R. 344). There is no evidence that either Klein or Burke took any part in the Democratic inter-party contest, which was the controversy out of which this prosecution arose.

In *United States* v. *Dire*, (2 Cir.) 159 F. 2d 818, the court said (l. c. 819):

> "We have several times had occasion to consider what relation to a conspiracy makes a man a confederate, and what relation to the principals in a crime makes a man an abettor; and we have uniformly held that the prosecution must prove the accused to have associated himself with the principals in the sense that he has a stake in the success of the venture."

See to like effect *Direct Sales Co.* v. *United States*, 319 U. S. 703, 713, 63 S. Ct. 1265, 1270.

Where, as here the charge is conspiracy, it is "essential to establish the existence of a confederation or agreement" before a conviction can be sustained.

Circumstances which merely raise suspicions or give room for conjecture are not sufficient evidence of guilt.

*Crain* v. *United States*, 148 F. 2d 615-617.

In the case of *Cartello* v. *United States*, (8 Cir.) 93 F. 2d 412, in an election conspiracy case this court said (l. c. 414):

> "(3) Aside from this testimony of the two witnesses for the government, which certainly did not tend to prove guilt on behalf of any of the defendants, the evidence is purely circumstantial. To sustain conviction, it must not only have been consistent with the defendants' guilt, but must have been inconsistent with their innocence. *Tingle* v. *United States*, (C. C. A. 8) 38 F. 2d 573; *Langer* v. *United States*, (C. C. A. 8) 76 F. 2d 817.
>
> "(4) We again advert to the fact that aside from the evidence in support of the overt acts, there is no evidence tending to show a conspiracy among these defendants. In the absence of such proof, proof sufficient to connect one of the defendants with the erasures and alterations on these ballots would, of course, be wholly insufficient to warrant a wholesale conviction of the other defendants. A conspiracy is the gist of the offense, and that conspiracy must be proven beyond a reasonable doubt, either by direct or circumstantial evidence, or both. *Langer* v. *United States*, (C. C. A. 8) 76 F. 2d 817; *Dahly* v. *United States*, (C. C. A. 8) 50 F. 2d 37.
>
> " 'But in conspiracy cases, the unlawful combination, confederacy, and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action, and is the *corpus delicti* charged. It is, therefore, primarily essential to establish the existence of a

confederation or agreement between two or more persons before a conviction for conspiracy to commit an offense against the United States can be sustained.' "

In the case of *Dennert* v. *United States,* (6 Cir.) 147 F. 2d 286, in reversing a conspiracy case the court said (l. c. 286):

"(2) Nor was there any proof that he conspired. It may not be inferred from casual and unexplained meetings between Dennert and other persons charged, that he participated or even knew of the conspiracy. *United States* v. *Falcone,* 311 U. S. 205, 210, 61 S. Ct. 204, 85 L. Ed. 128.

(3) 'Circumstances which merely raise suspicion or give room for conjecture are not sufficient evidence of guilt. Wharton on Evidence, p. 1532. A conviction resting on them alone cannot stand.' *Kassin* v. *United States,* (5 Cir.) 87 F. 2d 183, 184."

Whenever a circumstances relied upon as evidence of criminal guilt is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference guilt may be fairly deducible.

*Dickerson* v. *U. S.,* 18 F. 2d 887 (8 C. C. A.).
*Gerson* v. *U. S.,* 25 F. 2d 49 (8 C. C. A.).
*Cox* v. *U. S.,* 96 F. 2d 41.
*Turinetti* v. *U. S.,* 2 F. 2d 15 (8 C. C. A.).

In the case of *Turinetti* v. *United States, supra,* in a criminal conspiracy case the Court said (l. c. 17):

"Whenever a circumstance, relied upon as evidence of criminal guilt, is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference, guilt may be fairly deducible."

See to like effect *Roukous* v. *United States,* (1 Cir.) 195 Fed. 353 (5), and *Leslie* v. *United States,* (10 Cir.) 43 F. 2d 288, 289-290, and cases therein cited.

In the case of *Cox* v. *United States, supra,* in a criminal case the Court said (l. c. 43):

> "Evidence which is consistent with two conflicting hypotheses tends to prove neither, *Gunning* v. *Cooley,* 281 U. S. 90, 94, 50 S. Ct. 231, 74 L. Ed. 720; *Stevens* v. *The White City,* 285 U. S. 195, 204, 52 S. Ct. 347, 76 L. Ed. 699; and proof of circumstances which, while consistent with guilt, are not inconsistent with innocence, will not support a conviction, *Spalitto* v. *United States,* (9 Cir.) 39 F. 2d 782, 784; *Van Gorder* v. *United States,* (8 Cir.) 21 F. 2d 939, 942; *Cravens* v. *United States,* (8 Cir.) 62 F. 2d 261, 274; *McClintock* v. *United States,* (10 Cir.) 60 F. 2d 839, 842."

Knowledge of a conspiracy, full sympathy with an approval of its object, does not constitute one a conspirator.

*McDaniel* v. *U. S.,* 24 F. 2d 303.
*Lamber* v. *U. S.,* 26 F. 2d 773.
*Colbaugh* v. *U. S.,* 15 F. 2d 929 (8 C. C. A.).
*Lucadam* v. *U. S.,* 280 Fed. 653.
*Jianole* v. *U. S.,* 299 Fed. 496 (8 C. C. A.).
*Thomas* v. *U. S.,* 57 F. 2d 1039.
*U. S.* v. *Potash,* 118 F. 2d 54.
*Moss* v. *U. S.,* 132 F. 2d 875.
*Brooks* v. *U. S.,* 164 F. 2d 142.

In the case of *Brooks* v. *United States,* (5 Cir.) 164 F. 2d 142, in a criminal conspiracy case the Court said (l. c. 143):

> "(2, 3) The charge here was a blanket one that all of the defendants were parties to a single general conspiracy, and the evidence in the case as to any agreement or understanding between some of the de-

fendants at least is wholly circumstantial. In this situation, due process as to each defendant required for a conviction that the evidence be strong enough to exclude every other reasonable hypothesis than the guilt of that defendant of the precise conspiracy charged. It also required that in the reception and application of the evidence offered to prove that conspiracy, each defendant should by appropriate rulings and instructions be protected from the hazard of being convicted on the general principle apparently relied on by the government below and here that, though not shown to be guilty of the particular conspiracy charged, no legal harm would be done any defendant by convicting him upon proof that he was engaged with any other of the defendants in a separate conspiracy of the general nature of the conspiracy charged. This theory approved by the Circuit Court of Appeals in the Katteakos case was definitely repudiated in the Supreme Court. It will not be approved here."

We submit there is here wholly lacking any probative testimony that Burke knew, approved, and voluntarily, willingly, knowingly, and intentionally cooperated or agreed to cooperate in this alleged conspiracy. The necessary elements are lacking and this case should be reversed as to Burke.

The learned trial judge recognized the fact the evidence, as to Burke, was extremely weak. In his charge he stated (R. 613):

> "However, the character of the evidence as to defendants Burke and Holmes, compels me to say to you that you should sound well and carefully the evidence as to these defendants in arriving at your verdict."

We contend that by these circumstances the government failed to produce substantial evidence, rendering the issue submissible. We submit that no such conclusion can be reached on the circumstantial evidence herein, without

contravening one or both of two settled legal principles, *i. e.*:

1. A conclusion reached by piling one inference upon another inference is of no probative value.

2. Where two inferences may be drawn from a circumstance or set of circumstances, one innocent, and another incriminatory, the same does not constitute substantial evidence.

## CONCLUSION.

For the foregoing reasons, petitioners respectfully urge that a rehearing be granted; that upon further consideration the order of November 7, 1949, denying the petition for certiorari, be revoked; and that the writ of certiorari issue.

Respectfully submitted,

WALTER A. RAYMOND,
*Counsel for Petitioners.*

IRA B. MCLAUGHLIN,
LOUIS WAGNER,
JOSEPH KORALCHIK,
All of Kansas City, Missouri,
WILL H. HARGUS,
Harrisonville, Missouri,
*Of Counsel.*

I, Walter A. Raymond, counsel for the above named petitioners, Morris Klein and Harry Burke, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Walter A. Raymond
*Counsel for Petitioners.*